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### Employment Discrimination and Presidential Immunity Cases

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# EMPLOYMENT DISCRIMINATION CASES PRESIDENTIAL IMMUNITY CASES

Dean Eileen Kaufman<sup>1</sup>

*Hon. Leon D. Lazer:*

I thought that was certainly one of the most stirring discussions emotionally and intellectually that I have heard in some time. From all of this high drama, we now have to move to the rest of the cases that are at least worthy of some discussion, and, of course, that leaves Professor Kaufman and myself. It is my pleasure to introduce the Vice Dean of this law school, who is a lecturer on Constitutional Law, and, of course, I have got to make this personal. Those of you who know that I am the chair of Pattern Jury Instructions<sup>2</sup> will now know, if you have not known it, that the editor and reporter for volume two is Professor Kaufman. She is frequently a lecturer before judicial bodies on a variety of subjects, but she has particular interest in at least a couple of cases that she is now going to discuss. It is my pleasure to present to you Vice Dean Eileen Kaufman.

*Dean Eileen Kaufman:*

Thank you. Leon always asks me to speak late in the day, which I never mind, but following Leon Friedman makes it very difficult.

The four cases that Leon asked me to discuss do not fit neatly within one category, nor do they suggest any particular unifying

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<sup>2</sup> LEON D. LAZER, PATTERN JURY INSTRUCTIONS (3d ed. 1997).

theme. *Robinson v. Shell Oil*<sup>3</sup> is a statutory case that resolves the issue of whether a former employee can bring a retaliation claim under Title VII,<sup>4</sup> the employment discrimination statute. The next case, *Clinton v. Jones*,<sup>5</sup> while also, in a sense, a discrimination case, resolves the issue of whether there is presidential immunity from civil suits based on actions taken before assuming office.<sup>6</sup> The third case, *Bracy v. Gramley*,<sup>7</sup> while also involving misconduct by one in high office, resolves the question of whether a criminal defendant has a due process right to a trial by an unbiased judge.<sup>8</sup> Finally, *M. L. B. v. S. L. J.*,<sup>9</sup> while also involving due process, resolves the question of whether an indigent parent can be deprived of the right to appeal the termination of her parental rights due to an inability to pay the required costs.<sup>10</sup>

The first of the four cases is *Robinson v. Shell Oil*.<sup>11</sup> In *Robinson*, a unanimous Court held that for purposes of a retaliation suit under Title VII, the word employee includes former employee.<sup>12</sup> More specifically, the issue was whether a former employee could bring suit under Title VII for post employment action allegedly taken in retaliation for the employee having filed a discrimination suit under Title VII.<sup>13</sup> In 1991, Shell Oil fired the petitioner who had worked for the company for

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<sup>3</sup> 117 S. Ct. 843 (1997).

<sup>4</sup> 42 U.S.C. § 2000e-2 (1997). Title VII of the Civil Rights Act prohibits discrimination in employment with respect to race, color, religion, sex or national origin. *Id.*

<sup>5</sup> 117 S. Ct. 1636 (1997).

<sup>6</sup> *Id.* at 1644. “[W]e have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity.” *Id.*

<sup>7</sup> 117 S. Ct. 1793 (1997).

<sup>8</sup> *Id.* at 1797.

<sup>9</sup> 117 S. Ct. 555 (1997).

<sup>10</sup> *Id.* at 559.

<sup>11</sup> 117 S. Ct. 843 (1997).

<sup>12</sup> *Id.* at 849.

<sup>13</sup> *Id.* at 845.

years as a territorial sales representative.<sup>14</sup> He filed a charge with the Equal Employment Opportunity Commission [hereinafter "EEOC"] claiming that the discharge was based on racial discrimination.<sup>15</sup> While that charge was pending, he applied for a new job with Metropolitan Life Insurance Company, who asked Shell Oil for a job reference and gave Shell Oil a questionnaire to complete.<sup>16</sup> Shell Oil completed the questionnaire, indicating that the petitioner had not left his job voluntarily and that if the opportunity presented itself Shell Oil would not rehire him.<sup>17</sup> Additionally, with respect to nine different categories, Shell reported that petitioner's performance was below average and his attendance was poor.<sup>18</sup>

Robinson learned about this job reference and thereupon filed a second charge of discrimination in which he claimed that the negative reference was in retaliation for his having filed his original Title VII race discrimination claim.<sup>19</sup> His retaliation claim was based on a provision of Title VII, section 704A,<sup>20</sup> which makes it unlawful for an employer to discriminate against employees or applicants who have availed themselves in some way of Title VII's protection.<sup>21</sup> The district court dismissed his claim concluding that the section does not cover former

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<sup>14</sup> *Id.* See *Court Looks at Civil Rights Provision*, UNITED PRESS INT'L, BC Cycle, Nov. 6, 1996 (stating that Mr. Robinson had served for twelve years as a territorial sales representative in Shell's Mid-Atlantic retail marketing district).

<sup>15</sup> *Robinson*, 117 S. Ct. at 845.

<sup>16</sup> *Id.*

<sup>17</sup> See *supra* note 14.

<sup>18</sup> *Id.*

<sup>19</sup> *Robinson v. Shell Oil*, 70 F.3d 325, 327 (4th Cir. 1995), *rev'd*, 117 S. Ct. 843 (1997).

<sup>20</sup> *Id.*; 42 U.S.C. § 2000e-3(a) (1997). Section 2000e-3(a) of Title VII provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation or hearing under this subchapter." *Id.*

<sup>21</sup> *Robinson*, 70 F.3d at 327; 42 U.S.C. 2000e (f) (1997). Section 2000e (f) of Title VII defines "employee" as an "individual employed by an employer . . . ." *Id.*

employees.<sup>22</sup> The Fourth Circuit reversed, but upon re-hearing en banc, the panel's decision was vacated and the district court's determination that former employees may not bring suit under § 704A for retaliation was affirmed.<sup>23</sup>

The Fourth Circuit's ruling was contrary to decisions from the Second Circuit,<sup>24</sup> the Third Circuit,<sup>25</sup> the Tenth Circuit,<sup>26</sup> and the Eleventh Circuit,<sup>27</sup> which all had held that the term employees did

<sup>22</sup> *Robinson*, 117 S. Ct. at 845.

<sup>23</sup> *Id.*

<sup>24</sup> See *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462 (2d Cir. 1997) (holding that plaintiff may be able to state a claim for retaliation, even though no longer employed with the defendant company, if the employer "blacklists" the plaintiff, wrongfully refuses to write a recommendation, or sullies the plaintiff's reputation); *Conn. Light & Power Co. v. Dep't of Labor*, 85 F.3d 89 (2d Cir. 1996) (holding that the term "employee" includes former employee as long as the alleged discrimination is related to or arises out of the employment relationship); *Patchenko v. C.B. Dolge*, 581 F.2d 1052 (2d Cir. 1978) (holding that although plaintiff was no longer employed by defendant, she was an "employee" for the purposes of maintaining an action under Title VII for discrimination on the basis of sex).

<sup>25</sup> See *Kachmar v. Sungard*, 109 F.3d 173 (3d Cir. 1997) (holding that a former employee stated prima facie case of discriminatory retaliation under Title VII); *Nelson v. Upsala College*, 51 F.3d 383 (3d Cir. 1995) (holding that a former employee has standing to bring a retaliation suit under § 704); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194 (3d Cir. 1994) (holding that a teacher no longer employed by school district was deemed an "employee" for the purpose of bringing an action under Title VII when the school district sought revocation of her teaching license in alleged retaliation for her having filed a Title VII claim).

<sup>26</sup> See *Berry v. Stevenson Chevrolet*, 74 F.3d 980 (10th Cir. 1996) (holding that a former employee who quit his job after eleven years of employment was entitled to bring a Title VII constructive discharge suit on the basis of race discrimination); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) (holding that plaintiff could not be precluded from bringing an action under Title VII for retaliatory discharge based on sex discrimination just because she had voluntarily terminated her employment several months prior).

<sup>27</sup> See *Sherman v. Burke Contracting Inc.*, 891 F.2d 1527 (11th Cir. 1990) (holding that a black former employee could maintain an action against former employer for persuading new employer to discharge him in retaliation for his filing a Title VII complaint that he was fired for marrying a white woman); *Bailey v. U.S.X. Corp.*, 850 F.2d 1506 (11th Cir. 1988) (holding that a

include former employees.<sup>28</sup> At oral argument in the Supreme Court, before the petitioner's attorney could even begin his argument, he was questioned about the practical effect of the relief he was seeking.<sup>29</sup> Chief Justice Rehnquist said that if Robinson prevailed, an EEOC complaint would be "[a] sure way to make sure you don't get a bad reference even though the firing [was] completely justified."<sup>30</sup> Justice Scalia added, that if someone planned to quit, it would also be prudent to file an EEOC complaint regardless of the circumstances in order to prevent a negative job reference in the future.<sup>31</sup>

Despite the concerns raised during the oral argument, a unanimous Court, in an opinion written by Justice Thomas, concluded in rather short order that the word employee, while ambiguous, should be interpreted to include former employees.<sup>32</sup> The Court reasoned that that definition is more consistent with the broader context of Title VII and with the primary purpose of the anti-retaliation provision.<sup>33</sup> Justice Thomas relied primarily on the position advanced by his former agency, the EEOC.<sup>34</sup> The EEOC argued that the exclusion of former employees from the protection of § 704A, would undermine the effectiveness of Title VII by allowing the threat of post employment retaliation to deter victims of discrimination from complaining to the EEOC.<sup>35</sup> It would also provide a perverse incentive for employers to fire

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former employee has standing to bring a Title VII action against his former employer for making adverse comments to a prospective employer in retaliation for former employee's previous sex discrimination suit).

<sup>28</sup> Holland & Hart LP, *U.S. Supreme Court Decision Leads to New Concerns Regarding Employee References*, COLORADO EMPLOYMENT LAW LETTER, Apr. 1997.

<sup>29</sup> Robinson v. Shell Oil, No. 95-1376, 1996 WL 656475, at \*4 (U.S. Oral Arg. 1996).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Robinson v. Shell Oil, 117 S. Ct. 843, 849 (1997).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 848.

<sup>35</sup> *Id.*

employees who might bring Title VII claims.<sup>36</sup> While this unanimous decision appears relatively non-controversial and straightforward, it has sent shivers down the collective spines of employers who now fear that any time they issue a negative reference for a discharged employee who has claimed race or gender discrimination, they may be inviting another Title VII claim.<sup>37</sup>

The qualified immunity from defamation suits that employers enjoy with respect to job references for prior employees will not insulate them from potential liability in a retaliation suit brought under Title VII.<sup>38</sup> There was an article that appeared in the Colorado Employment Law Letter<sup>39</sup> that warns employers about this danger and posits the following scenario.<sup>40</sup> An employee is fired, and then the employee falsely claims that he or she was fired because of race or gender discrimination, when in fact it was because of poor job performance.<sup>41</sup> Then, an employer truthfully provides a negative reference for the employee and the employee sues employer for unlawful retaliation.<sup>42</sup> The Employment Law Letter asks, "what is an employer to do?"<sup>43</sup> Apparently what some employers have chosen to do is to adopt a no-comment policy, whereby they simply refuse to offer any job reference when asked in order to prevent this problem.<sup>44</sup>

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<sup>36</sup> *Id.* (citing Amici Brief for United States and EEOC at 8, *Robinson v. Shell Oil*, 117 S. Ct. 843 (1997)(No. 95-1376)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Holland & Hart, LLP, *U.S. Supreme Court Decision Leads to New Concerns Regarding Employee References*, COLORADO EMPLOYMENT LAW LETTER, Apr., 1997 (commenting on the potential impact of the *Robinson* decision).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* Another option is for the employer to provide a neutral reference which gives only the most basic employment information, unless the employee signs a complete release against claims. *Id.* Even if the employee is willing to sign such a release, the Letter suggests that the employer take care to be truthful and accurate, and consistent in the amount of detail supplied. *Id.*

The next case, *Clinton v. Jones*,<sup>45</sup> was one of the most closely watched cases of the term. As virtually the whole world knows by now, Paula Jones brought an action against President Clinton containing state and federal law claims arising from an incident that occurred before President Clinton took office, but while he was still Governor of Arkansas.<sup>46</sup> She alleges that he made abhorrent sexual advances, which she rejected.<sup>47</sup>

Among the claims raised against Clinton were civil rights claims that his conduct deprived her of federally protected rights, and that Clinton and a former state trooper allegedly conspired to deprive her of her federally guaranteed rights, and common law tort claims, that Clinton's conduct constituted intentional infliction of emotional distress, as well as defamation.<sup>48</sup> With the possible exception of the defamation claim, all of the conduct alleged occurred before Clinton assumed the office of President.

President Clinton filed a motion to dismiss on the ground of presidential immunity, requesting the court to dismiss the action without prejudice and to toll the statute of limitations until he is no longer President, at which time the plaintiff could re-file her action.<sup>49</sup> The district court denied the motion, ordered discovery to proceed, but also ordered any trial stayed until the end of the President's term. Both parties appealed.<sup>50</sup> The Eighth Circuit affirmed the denial of the motion to dismiss, but reversed the

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<sup>45</sup> 117 S. Ct. 1636 (1997).

<sup>46</sup> *Id.* at 1639. Mr. Clinton was Governor of Arkansas from 1979 to 1981 and from 1983 to 1992. Kenneth J. Garcia, *Arkansas Under Clinton: Clinton Learned From 1980 Election Loss*, THE SAN FRANCISCO CHRONICLE, October 9, 1992, at A1.

<sup>47</sup> *Id.* at 1640. Ms. Jones further claimed that after she rejected these advances, her "superiors at work . . . dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances." *Id.*

<sup>48</sup> *Id.* Jones claimed that Clinton "acting under color of law deprived her of [her] rights [under] Rev. Stat. § 1979 [and] 42 U.S.C. § 1983," and conspired with the trooper to violate her rights under 42 U.S.C. § 1980 and 42 U.S.C. § 1985. *Id.*

<sup>49</sup> *Id.* at 1640.

<sup>50</sup> *Id.* at 1641.



order that stayed the trial.<sup>51</sup> Somewhat surprisingly, a unanimous United States Supreme Court affirmed<sup>52</sup> with Justice Stevens delivering the opinion for the court,<sup>53</sup> and Justice Breyer writing a very interesting concurring opinion.<sup>54</sup>

We should note a couple of issues that the Court did not decide in this case. First was whether immunity would attach if the suit were brought in state, rather than federal court.<sup>55</sup> That would implicate questions of federalism as opposed to separation of powers. Second was whether a court could compel the attendance of the President at any specific time and place.<sup>56</sup> On that issue, the Court assumed that there would be no necessity for the President to attend in person unless he wanted to, and that his testimony could be taken at the White House at a time that would accommodate his schedule.<sup>57</sup> The issue decided by the Court was whether the Constitution affords the President temporary immunity from civil damage suits arising out of events that occurred before he took office.<sup>58</sup>

In rejecting Clinton's claim of immunity, the Court noted that the rationale for immunity from suits for damages arising out of official duties, is not applicable to unofficial conduct.<sup>59</sup> The Court said that the public interest is served by enabling officials

<sup>51</sup> *Id.* The Eighth Circuit Court of Appeals concluded that staying the appeal would be the "functional equivalent of a grant of temporary immunity," and thus reversed that order. *Id.*

<sup>52</sup> *Id.* at 1652.

<sup>53</sup> *Id.* at 1639.

<sup>54</sup> *Id.* at 1652. (Breyer, J., concurring).

<sup>55</sup> *Id.* at 1642.

<sup>56</sup> *Id.* at 1643.

<sup>57</sup> *Id.* The Court noted that "[a]lthough Presidents have responded to written interrogatories, given depositions, and provided videotaped trial testimony . . . no sitting President has ever testified, or been ordered to testify, in open court." *Id.* at 1643 n.14.

<sup>58</sup> *Id.* at 1639. Prior to Mr. Clinton, only three other sitting Presidents were defendants in civil cases concerning their actions before assuming office. Two of them, Teddy Roosevelt and Harry Truman, had their cases dismissed prior to taking office. The third, President Kennedy, settled a case while he was in office arising from an auto accident. *Id.* at 1643.

<sup>59</sup> *Id.* at 1643.

to carry out their functions unimpeded by the threat that a particular decision may give rise to personal liability.<sup>60</sup> Indeed, that was the basis for the Court's decision in *Nixon v. Fitzgerald*,<sup>61</sup> where the Court held that a former President was entitled to absolute immunity from damages liability predicated on his official acts.<sup>62</sup> The essential concern was to avoid rendering the President unduly cautious in the discharge of his official duties.<sup>63</sup> That rationale simply does not support a grant of immunity for unofficial conduct, and everyone in the case agreed that the conduct alleged here was clearly unofficial.<sup>64</sup>

History figured prominently in the arguments of this case, with President Clinton relying on President Jefferson's protest of a subpoena in the Aaron Burr treason trial, and statements made by Vice President John Adams that the President is not subject to any process whatsoever.<sup>65</sup> Justice Stevens, quoting Justice Jackson said,

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams

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<sup>60</sup> *Id.*

<sup>61</sup> 457 U.S. 731 (1982) (granting absolute immunity for official acts of President Nixon that may have been unlawfully retaliatory in authorization of the dismissal of a Department of Air Force employee who had previously testified before Congress to the embarrassment of the Government).

<sup>62</sup> *Id.* at 755. The Court stated that "[i]n view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756.

<sup>63</sup> *Id.* at 744-45. The Court stated:

In the absence of immunity . . . executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

*Id.* (citation omitted).

<sup>64</sup> *Clinton*, 117 S. Ct. at 1640.

<sup>65</sup> *Id.* at 1644-45.

Joseph was called upon to interpret for Pharoah. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side.<sup>66</sup>

That is reminiscent of Judge Harold Leventhal's observation that relying on legislative history is like "looking out over a crowd of people like this and picking out your friends."<sup>67</sup>

Based on the text and the structure of the Constitution, the Court agreed with President Clinton's initial premise that the presidency is a unique office.<sup>68</sup> Nevertheless, the Court rejected his separation of powers argument.<sup>69</sup> Clinton argued that separation of powers principles would be violated by allowing the civil action to proceed, because it would interfere with his ability to carry out and perform his official duties.<sup>70</sup> However, the Court found that history did not support his prediction, because in more than two hundred years only three sitting Presidents had ever been subjected to suit for non-official conduct, and it had not posed a problem.<sup>71</sup> Further, the Court concluded that separation of powers does not prohibit one branch from having any control over the acts of another.<sup>72</sup> The Court said that "[t]he fact that a

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<sup>66</sup> *Id.* at 1645.

<sup>67</sup> See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

<sup>68</sup> 117 S. Ct. at 1646-47. "[T]he doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action." *Id.* at 1647. See also U.S. CONST. art. II, § 1. This Article provides in pertinent part: "The executive power shall be vested in a President of the United States . . . ." *Id.*

<sup>69</sup> *Id.* at 1647. "It does not follow, however, that separation of powers principles would be violated by allowing this action to proceed . . . . Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies." *Id.* at 1647-48.

<sup>70</sup> *Id.* at 1648. See also *Loving v. United States*, 116 S. Ct. 1737 (1996) (stating that "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.").

<sup>71</sup> *Id.* at 1648.

<sup>72</sup> *Id.* at 1648-49. "[S]eparation of powers does not mean that the branches 'ought to have no *partial agency* in, or no *control* over the acts of each other.'" *Id.* at 1648 (citation omitted).

federal court's exercise of its traditional Article Three jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."<sup>73</sup>

The Court relied on two principles, both attributed to Chief Justice John Marshall. The first principle, which has its origin in *Marbury v. Madison*<sup>74</sup> is that the Supreme Court is the ultimate arbiter of the Constitution.<sup>75</sup> The Court clearly has the power to determine whether the President has acted within the law.<sup>76</sup> A modern application of that principle is *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>77</sup> where the Supreme Court decided that President Truman had exceeded his constitutional authority in ordering a seizure of the steel mills.<sup>78</sup> The second principle that the Court relied on is that the President is subject to judicial process in certain circumstances.<sup>79</sup> The historical example is when Chief Justice Marshall presided over the Aaron Burr treason trial and ruled that a subpoena could be directed to the President.<sup>80</sup> The modern counterpart, of course, is *United States v. Nixon*,<sup>81</sup> where the Court held that President Nixon was obligated to comply with the subpoena requiring him to produce the infamous tape recordings in the Oval Office.<sup>82</sup>

Drawing on these two principles the Court concluded that "if the judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and . . . direct appropriate process to the President himself, [then] the federal courts have power to determine the legality of

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<sup>73</sup> *Id.* at 1648-49.

<sup>74</sup> 5 U.S. 137 (1803).

<sup>75</sup> *Id.* at 180.

<sup>76</sup> *Clinton*, 117 S. Ct. at 1649.

<sup>77</sup> 343 U.S. 579 (1952).

<sup>78</sup> *Clinton*, 117 S. Ct. at 1649.

<sup>79</sup> *Id.* at 1649.

<sup>80</sup> See *United States v. Burr*, 25 F. Cas. 30 (Va. 1807).

<sup>81</sup> 418 U.S. 683 (1974).

<sup>82</sup> *Id.* at 713 (holding that "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.").

his unofficial conduct.”<sup>83</sup> Thus, the Court held “that the doctrine of separation of powers does not require the federal courts to stay all private actions against the President until he leaves office.”<sup>84</sup>

Having found that the Constitution does not require the issuance of a stay, the Supreme Court went on to review whether or not the district court’s order staying the trial was an abuse of discretion.<sup>85</sup> While noting that federal courts have broad discretion with respect to managing their dockets and scheduling their cases, the Court nevertheless concluded that it was an abuse of discretion to stay the trial until after the President leaves office because the district court was not yet in a position to assess whether or not the trial would interfere with the President’s duties.

Finally, the Court dismissed as insubstantial two concerns that had been raised by the President: first, that this decision could generate a large volume of politically motivated harassing and frivolous litigation<sup>86</sup>; and second, the danger that national security concerns might prevent the President from explaining why he would need a stay.<sup>87</sup> The Court said that if Congress believes that the President needs more protection, there is nothing to prevent Congress from enacting legislation providing for the deferral of litigation in order to accommodate the President’s concerns.<sup>88</sup>

Justice Breyer wrote a concurring opinion in which he agreed 1) that the Constitution offers no automatic immunity in cases like this, and 2) that the district court’s order staying the trial was

<sup>83</sup> *Clinton*, 117 S. Ct. at 1650.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (stating that the risk of frivolous litigation is not serious because “most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant.”).

<sup>87</sup> *Id.* The Court stated that the district courts traditionally accommodate the President’s needs by giving “the utmost deference to Presidential responsibilities.” *Id.* at 1652. In addition, the Court noted that several Presidents have given testimony without jeopardizing the Nation’s security. *Id.*

<sup>88</sup> *Id.* at 1652. See, e.g., 11 U.S.C. § 362 (providing that litigation against debtor stayed upon filing of bankruptcy petition).

premature.<sup>89</sup> However, in a thoughtful, and in my view, persuasive opinion, Justice Breyer explains how the Constitution prohibits a federal judge from interfering with the President's discharge of his official duties.<sup>90</sup> He emphasizes the fact that Article II vests the entire "Executive power" in a single individual, which makes that branch of government very different from Congress and from the judiciary.<sup>91</sup> Congress can sit and function, even if up to half of its members are absent.<sup>92</sup> The judiciary can function even if it means designating judges from other circuits to sit.<sup>93</sup> However, in Justice Breyer's view, interference with the President's ability to carry out his public responsibilities is constitutionally equivalent to interference with the ability of the entire Congress or the judicial branch to carry out their public obligation.<sup>94</sup> Further, Justice Breyer is not nearly as sanguine as is the majority about the ability of federal judges to rely on case management techniques in order to prevent interference with the President's performance of his duties. Instead, Justice Breyer predicted that there will be a need for

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<sup>89</sup> *Id.* (Breyer, J., concurring) (agreeing with the majority which held that in order to obtain a postponement of a civil law suit against him, the President must "bear the burden of establishing a need.").

<sup>90</sup> *Id.* (Breyer, J., concurring).

<sup>91</sup> *Id.* (Breyer, J., concurring). The intention of the Founders in vesting Executive Authority in one person was to focus executive responsibility thereby facilitating accountability and encouraging energetic, decisive and speedy execution of the laws. *Id.* (Breyer, J., concurring). See, e.g., JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 144 (J. Gough ed. 1947) (desirability of a Perpetual Executive); THE FEDERALIST No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (finding Executive "[e]nergy" needed for security, "steady administration of the laws," "protection of property," "justice" and "protection of "liberty"); Compare U.S. CONST. art. I, § 1 (vesting power in "a Congress" that "consists of a Senate and a house of Representatives" and U.S. CONST. art. II, § 1 (vesting power in "a President"); and U.S. CONST. art. III, § 1 (vesting power in a "Supreme Court" and inferior Courts.").

<sup>92</sup> *Id.* at 1653 (Breyer, J., concurring) (citing U.S. CONST. art. I., § 5, cl. 1).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1654 (Breyer, J., concurring).

courts to develop administrative rules to make sure that a federal court order does not interfere with presidential duties.<sup>95</sup>

Justice Breyer agreed that the stay of the trial in this case was premature because the district court had not yet been presented with an explanation as to why the immunity is needed.<sup>96</sup> However, he cautioned that separation of powers principles prevent district judges from exercising other than a very limited power to second guess the President once he does offer an explanation.<sup>97</sup>

In my opinion, we are unlikely to see how this aspect of the case plays out because there are so many other issues that remain to be resolved in this case. I did notice in this morning's New York Times, that the trial is scheduled for May,<sup>98</sup> but I will be surprised if we see the trial in May, not just because the case may settle, but because there are many other issues that remain to be resolved.

Among those issues is whether Paula Jones has stated a viable cause of action under § 1983. Paula Jones did not bring a Title VII claim because the statute of limitations had run on that claim. She asserted her claim under Section 1983, and that raises the

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<sup>95</sup> *Id.* at 1658 (Breyer, J., concurring). Justice Breyer is skeptical with regard to the majority's optimistic view that allowing a civil suit will not interfere with the discharge of the President's official duties, arguing that it poses a real danger. *Id.* at 1659 (Breyer, J., concurring).

<sup>96</sup> *Id.* at 1659 (Breyer, J., concurring).

<sup>97</sup> *Id.* at 1658 (Breyer, J., concurring).

The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.

*Id.* (Breyer, J., concurring) (quoting THE FEDERALIST No. 51, (James Madison)).

<sup>98</sup> James Bennet, *Seal is Placed on Documents in Clinton Suit*, N.Y. TIMES, Oct. 31, 1997, at A22. The trial is scheduled for May 26, 1998. *Id.*

question whether sexual harassment by a government official violates a federally secured right.<sup>99</sup>

Some of you may be familiar with *United States v. Lanier*.<sup>100</sup> *Lanier* was a case involving horrendous sexual misconduct by a sitting judge, directed against litigants in his court and employees in his chambers.<sup>101</sup> The issue that was presented to the Supreme Court this year, but not resolved, was whether sexual harassment of the type practiced by a sitting judge, while literally wearing his judicial robe, was a right that could be asserted under the Fourteenth Amendment. What is the source of that Constitutional right? The Court did not decide that issue in *Lanier*.

Should President Clinton argue that he is protected by a qualified immunity, that issue would probably be resolved by summary judgment motion. If he loses that, he is entitled to take an interlocutory appeal, followed perhaps by another round in the United States Supreme Court on that issue. All of this suggests that he may be out of office by the time any trial is untimely scheduled.

The third case, *Bracy v. Gramley*,<sup>102</sup> also involved misconduct by one in high office, but this time it was a judge presiding over murder trials. The case establishes a due process right to a trial presided over by an unbiased judge.<sup>103</sup> The more specific issue raised in the case was whether a death row inmate who had been convicted of a triple murder could successfully obtain discovery pursuant to Habeas Corpus Rule 6 (a), which requires a showing

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<sup>99</sup> *Clinton*, 117 S. Ct. at 1640. See also Harvey Berman and Marcia Coyle, *Jones' Victory May Be Short Lived*, N.Y. TIMES, June 9, 1997, at A7.

<sup>100</sup> 117 S. Ct. 1219 (1997).

<sup>101</sup> *Id.* at 1222-23. Lanier was convicted of sexual assault of five women while he was a state judge. One of the most serious assaults was against a woman whose divorce proceedings came before Lanier and whose daughter's custody remained subject to his jurisdiction. *Id.* When the woman applied for a secretarial job, Lanier suggested that he would reexamine her daughter's custody, and when she attempted to leave, he grabbed her, sexually assaulted her, and committed oral rape. *Id.*

<sup>102</sup> 117 S. Ct. 1793 (1997).

<sup>103</sup> *Id.* at 1797.



of good cause before discovery can proceed.<sup>104</sup> Unlike other litigants, an inmate seeking a federal writ of Habeas Corpus, is not automatically entitled to discovery, but must establish good cause.<sup>105</sup>

The discovery that the petitioner sought related to misconduct on the part of the Judge Maloney, who had presided over his trial.<sup>106</sup> Judge Maloney had been convicted of very serious misconduct: conspiracy, racketeering, extortion, and obstruction of justice. This was part of Operation Greylord, which was a major federal investigation of judicial corruption in Cook County, Illinois,<sup>107</sup> which resulted in eighteen judges being convicted of federal corruption charges.<sup>108</sup> Apparently, Judge Maloney was accepting bribes to fix murder cases.<sup>109</sup> Petitioner's theory of bias was that if Judge Maloney was accepting bribes to fix murder cases in defendants' favor, then he had an interest in securing a conviction in the petitioner's case in order to deflect

<sup>104</sup> *Id.* at 1795-97. In 1976, Congress adopted the Rules Governing § 2254 Cases. *Id.* at 1797. In particular, Rule 6(a) provides: "A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of discretion and for good cause shown grants leave to do so, but not otherwise." *Id.*

<sup>105</sup> *Id.* at 1797. See *Harris v. Nelson*, 394 U.S. 286, 295 (1969) (concluding that the broad discovery provisions of the Federal Rules of Civil Procedure did not apply in habeas proceedings). However, the Court noted, 28 U.S.C. § 1651 gave the federal courts power to "fashion appropriate modes of procedure" including discovery, to dispose of habeas petitions "as law and justice require." *Id.* at 299-300.

<sup>106</sup> *Id.* at 1796.

<sup>107</sup> *Id.* at 1795-96; See *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 295 (1996).

<sup>108</sup> *Id.* at 1795.

<sup>109</sup> *Id.* at 1795-96. The Court noted that:

Maloney served as a judge from 1977 until he retired in 1990, and it appears he has the dubious distinction of being the only Illinois judge ever convicted of fixing a murder case. Before he was appointed to the bench, Maloney was a criminal defense attorney with close ties to organized crime who often paid off judges in criminal cases.

*Id.*

suspicion that he was taking bribes in other cases.<sup>110</sup> Those other cases were tried just before and just after petitioner's own case.<sup>111</sup> Petitioner's suspicions also arose because his attorney was appointed by Judge Maloney, and his attorney was previously a law partner of Judge Maloney, working in a law firm that had been implicated in corruption.<sup>112</sup> Additionally, his attorney was capitulating rather quickly to speeding this case to trial.<sup>113</sup>

Despite all of that, the district court denied the petitioner's Rule 6 (a) motion for discovery, and the Seventh Circuit affirmed finding compelling evidence of his guilt and no proof other than mere speculation of judicial bias.<sup>114</sup> Judge Richard Posner wrote, "The defendant must show either the actuality, rather than just the appearance of judicial bias, or a possible temptation so severe that we might presume an actual substantive incentive to be biased."<sup>115</sup> An awfully difficult standard to meet.

Judge Alana Rover, writing in dissent, characterized Judge Maloney's courtroom "as justice for sale."<sup>116</sup> Judge Rover further stated, "[that] we may no more treat Maloney as an impartial arbiter for constitutional purposes than a delusional megalomaniac who locks a judge in the closet, dons black robes

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<sup>110</sup> *Id.* at 1798.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1798. In support of his claim, Petitioner submitted a copy of Maloney's 1991 indictment, App. 16-35, and a newspaper article describing testimony from Maloney's trial, in which attorney William Swano described an additional incident where he bribed Maloney to fix a murder trial, but was uncharged. *Id.* In addition, Petitioner's co-defendant Roger Collins, in a supplemental motion for discovery, alleged that co-defendant Bracy's trial attorney was a former partner of Thomas Maloney. *Id.* He also attached to the motion a copy of the United States Proffer of Evidence describing in detail Maloney's corruption before and after he became a judge. *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1794.

<sup>115</sup> *Bracy v. Gramley*, 81 F.3d 684, 688 (7th Cir. 1996) (citing *Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363, 1380 (7th Cir. 1994) (en banc) (rejecting a reversal on the mere appearance of bias, relying in part on the presumption that judicial officers perform their duties faithfully)).

<sup>116</sup> *Id.* at 696 (Rover, J., dissenting).

and hoodwinks everyone with a credible impersonation of Oliver Wendell Holmes." <sup>117</sup>

In yet another unanimous decision, the Supreme Court found that petitioner had established good cause within the meaning of Rule 6 (a) and could proceed with discovery to support his judicial bias claim.<sup>118</sup> Inherent in the decision is the recognition of a due process right to an unbiased judge.<sup>119</sup> Due process requires "a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case."<sup>120</sup> Thus, if the petitioner can prove that Judge Maloney's conduct in this murder trial was an attempt to camouflage his other misconduct, there is no question that such bias would violate the Due Process Clause of the Fourteenth Amendment.<sup>121</sup>

The unanimous decision in the case is somewhat surprising given the Court's hostility in recent years to expanding opportunities for criminal defendants to challenge their convictions. It is also surprising given the argument made, for example, in a brief filed by New York State Attorney General Vacco, and other attorney generals, warning that a ruling in petitioner's favor could potentially unsettle many criminal convictions.<sup>122</sup> The outcome in the case is at least likely to affect five other death row inmates in Cook County. In fact, one week after *Bracy* was decided, his co-defendant's case was remanded for further consideration.<sup>123</sup> To what extent it will affect the six-

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<sup>117</sup> *Id.* at 700. (Rover, J., dissenting).

<sup>118</sup> *Bracy*, 117 S. Ct. at 1795.

<sup>119</sup> *Id.* at 1799. The Court agreed with the court of appeals that although "[i]t may well be that petitioner will be unable to obtain evidence sufficient to support a finding of actual judicial bias in the trial of his case, [it held] that sufficient showing, as required by Habeas Corpus Rule 6 (a), to establish 'good cause' for discovery." *Id.*

<sup>120</sup> *Id.* at 1795

<sup>121</sup> *Id.* at 1797.

<sup>122</sup> Amicus Brief of Concerted Illinois Lawyers and Law Professors in Support of Petitioner, *Bracy v. Gramley*, 117 S. Ct. 1793 (1997) (No. 96-6133).

<sup>123</sup> 117 S. Ct. 2450 (1997).

thousand felony convictions obtained in Judge Maloney's courtroom remains to be seen.

The final case that Leon asked me to talk about is *M.L.B. v. S.L.J.*,<sup>124</sup> another due process case. *M.L.B.* is a very important equal access to justice case that raises the issue of whether an indigent can be denied an appeal to challenge the termination of parental rights due solely to inability to pay transcript costs.<sup>125</sup> In this case, the two parties were divorced with the father getting custody of the two children.<sup>126</sup> Three months later, he remarried, and petitioned the court to terminate the biological mother's parental rights on the theory that she was behind in her support payments, and that she had not complied regularly with her visitation schedule.<sup>127</sup> The court granted the request and terminated petitioner's parental rights.<sup>128</sup> The petitioner, Melissa Brooks, was working as a waitress at the time and earning \$2.13 an hour plus tips.<sup>129</sup> She filed an appeal, paid the \$100 filing fee, but could not afford the more than \$2,300 that was required for preparing and transmitting the transcript.<sup>130</sup> In Mississippi, where this case arose, civil litigants have the right to appeal, but they must prepay costs including a transcript.<sup>131</sup> Petitioner sought to proceed in forma pauperis<sup>132</sup>, but was denied relief because

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<sup>124</sup> 117 S. Ct. 555 (1997).

<sup>125</sup> *Id.* at 559.

<sup>126</sup> *Id.* The couple had been legally married for nearly eight years prior to their divorce. *Id.*

<sup>127</sup> *Id.* *M.L.B.* filed a counterclaim, in which she asked for primary custody of her children. She alleged that *S.L.J.* impermissibly denied the reasonable visitation rights spelled out in her divorce decree. *Id.*

<sup>128</sup> *Id.* "[T]he Chancellor declared that there had been a 'substantial erosion of the relationship between the natural mother, [M.L.B.] and the minor children . . .'" *Id.* (additional citation omitted).

<sup>129</sup> David G. Savage, *People's Court: Ruling for a Mother's Right Puts Human Face on Supreme Court's Work*, 83 A.B.A. J. 40 (1997).

<sup>130</sup> *M.L.B.*, 117 S. Ct. at 560.

<sup>131</sup> *Id.*

<sup>132</sup> Black Law Dictionary defines "in forma pauperis": "[P]ermission given to a poor person (i.e. indigent) to proceed without liability for court fees or costs. An indigent will not be deprived of his rights to litigate and appeal; if the court is satisfied as to his indigence he may

Mississippi only affords poor person relief at the trial level, not on appeal.<sup>133</sup> New York is different. New York is one state of twenty that waives the costs for indigent appellants in civil cases generally.<sup>134</sup> Ten other states do so in cases involving termination of parental rights.<sup>135</sup>

Before discussing the Court's decision in this case, let me provide a very quick background. When it comes to access to justice in criminal cases, the Court has held that the state must provide a free trial transcript to an indigent criminal defendant. In *Griffin v. Illinois*,<sup>136</sup> the Court held that even though there is no constitutional right to an appeal, once the state offers the right to a criminal appeal, it may not effectively deny that right to those unable to pay.<sup>137</sup> The *Griffin* rule was extended in *Mayer v. Chicago*,<sup>138</sup> a criminal case where the defendant did not face incarceration.

However, when it comes to access to civil justice, the Court has been far less generous. In *Boddie v. Connecticut*,<sup>139</sup> the

proceed without incurring costs or fees of court." BLACK'S LAW DICTIONARY 537 (6th ed. 1990) (citing FED. R. APP. P. 24).

<sup>133</sup> *Id.*

<sup>134</sup> Linda Greenhouse, *Needy Who Lose Parental Rights Gain In Top Court*, N.Y. TIMES, DEC. 17, 1996, at A1.

<sup>135</sup> *Id.*

<sup>136</sup> 351 U.S. 12 (1956). Petitioners, Griffin and Crenshaw, were tried and convicted of armed robbery. *Id.* at 13. Seeking full appellate review, petitioners filed motions requesting a certified copy of the record and stenographic transcript of proceedings at the trial. *Id.* They claimed that they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal . . ." *Id.* Both the trial court and the Illinois Supreme Court dismissed the petitioners without a hearing. *Id.* at 15. Petitioners "charge that refusal to afford full appellate review solely because of poverty was a denial of due process and equal protection." *Id.*

<sup>137</sup> *Id.* at 24. (Frankfurter, J., concurring). "The State is not free to produce such a squalid discrimination . . . (that) bolt(s) the door to equal justice." *Id.* (Frankfurter, J., concurring).

<sup>138</sup> 404 U.S. 189 (1971). Defendants were found guilty of disorderly conduct and interfering with police officers, both misdemeanor offenses. *Id.* at 412.

<sup>139</sup> 401 U.S. 371 (1971). Petitioners comprised a class of female welfare recipients who were frustrated in their attempts to initiate divorce actions in the

Court held that the state may not deny access to the courts for purposes of obtaining a divorce due to inability to pay fees and costs.<sup>140</sup> However, the *Boddie* decision was based on the singular importance of marriage in our society and also on the fact that the state has a virtual monopoly over the means for dissolving marriages.<sup>141</sup> Any thought that *Boddie* signified some broad access to justice principle was eliminated two years later in *United States v. Kras*,<sup>142</sup> where the Court rejected a claim by an indigent unable to pay a \$50 filing fee to obtain a discharge in bankruptcy.<sup>143</sup> He was too poor to go bankrupt.

Similarly, the Court in *Ortwein v Schwab*,<sup>144</sup> upheld a \$25 appellate filing fee applied to indigents who sought to appeal administrative decisions that affected their welfare benefits.<sup>145</sup> The Court found that welfare benefits, like bankruptcy, simply have less constitutional significance than the interest implicated in *Boddie*.<sup>146</sup>

The lesson to be drawn from these access to civil justice cases, is that absent a fundamental interest gained or lost depending on the availability of the relief sought, the Court is likely to uphold fee requirements that have the effect of preventing indigents from securing judicial review.

The question in *M.L.B.* thus becomes whether or not the prepayment requirement results in the deprivation of a

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courts of the state of Connecticut. *Id.* at 372-73. They brought this class action to challenge the constitutionality of Connecticut's statute that requires payment of court fees and service of process fees to gain access to the courts for a divorce. *Id.* at 372.

<sup>140</sup> *Id.* at 383. "A state may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee." *Id.* at 389 (Brennan, J., concurring in part).

<sup>141</sup> *Id.* at 380-81.

<sup>142</sup> 409 U.S. 434 (1973). The Court could not find any fundamental right in the Constitution to declare bankruptcy, and opined that the extension of such a right should come from the Congress, if at all. *Id.* at 446- 50.

<sup>143</sup> *Id.* at 450.

<sup>144</sup> 410 U.S. 656 (1973).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 659.

fundamental interest.<sup>147</sup> Justice Ginsburg, writing very carefully for a divided Court, concluded that the termination of parental rights does implicate a fundamental interest, given the primacy of family relations in our constitutional order.<sup>148</sup> That interest was recognized in *Lassiter v. Department of Social Services*,<sup>149</sup> where the Court held that even though there is no automatic right to appointed counsel in parental termination cases, an appointment would be due when warranted by the particular facts or particular difficulty of the case.<sup>150</sup> The *Lassiter* Court recognized that a parent's interest in maintaining the parent-child relationship is an important one that "undeniably warrants deference and absent a powerful countervailing interest, protection."<sup>151</sup>

Similarly in *Santosky v. Kramer*,<sup>152</sup> the Court held that a clear and convincing evidence standard is constitutionally required in parental termination cases, because few forms of state action are both so severe and so irreversible, and because the parents' interest is "commanding" and "far more precious than any property right."<sup>153</sup>

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<sup>147</sup> *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 559 (1996).

<sup>148</sup> *Id.* at 565.

<sup>149</sup> 452 U.S. 18 (1981). Woman incarcerated for first degree murder who chose not to be represented by counsel in parental rights termination hearing was not denied any fundamental rights because the case did not involve the taking away of defendant's personal freedom. *Id.* at 27.

<sup>150</sup> *Id.* at 31-32.

<sup>151</sup> *Id.* at 27 (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

<sup>152</sup> 455 U.S. 745 (1982). After certain incidents which indicated neglect, petitioners, John and Anna Santosky, lost custody of their three children. *Id.* at 751. Pursuant to New York's permanent neglect statute, the State must prove by a fair preponderance of the evidence that it made diligent efforts to foster the parental relationship and that the parents failed to have meaningful contact with the children while the children were removed from the home. *Id.* at 748-49. Upon successfully meeting its burden, the State terminated petitioners' parental rights in the three children. *Id.* at 751. The petitioners brought suit to determine "whether New York's 'fair preponderance of the evidence' standard is constitutionally sufficient." *Id.* at 750-51.

<sup>153</sup> *Id.* at 758-59. See also *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting). "A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child . . ." *Id.*

In *M.L.B.*, Justice Ginsburg rests her decision on both equal protection and due process grounds, and here the decision becomes a little murky.<sup>154</sup> For those of us who struggle to separate out equal protection analysis from due process analysis, she offers little guidance besides noting that cases of this order cannot be resolved by resort to easy slogans or pigeon hole analysis.<sup>155</sup> Instead, she directs us to look at the character and intensity of the individual interest at stake versus the state's justification for its exaction.<sup>156</sup> She applies what seems to be a balancing test, and concludes that the parent's interest in not having her relationship with her child permanently lost, outweighs the state's interest, which is merely financial.<sup>157</sup>

Justice Ginsburg repeatedly stresses in her decision that this case represents the exception rather than the rule.<sup>158</sup> She takes pains to reaffirm the general rule that fee requirements ordinarily are examined only for rationality, and that the state's need for revenue to offset costs will normally satisfy the rationality requirement.<sup>159</sup> She even distinguishes parental termination cases from loss of custody cases, because there, the parent at least is still able to see and have contact with the child.<sup>160</sup> In short,

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<sup>154</sup> *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 566 (1996). "In these cases, '[d]ue process and equal protection principles converge.'" *Id.* (citing *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)).

<sup>155</sup> *M.L.B.*, 117 S. Ct. at 566 (citing *Bearden v. Georgia*, 461 U.S. 660, 666 (1983)).

<sup>156</sup> *M.L.B.*, 117 S. Ct. at 566.

<sup>157</sup> *Id.* at 566.

<sup>158</sup> *Id.* at 568-69. "To recapitulate, termination decrees 'wor[k] a unique kind of deprivation.'" *Id.* at 569 (quoting *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 27 (1981)).

<sup>159</sup> *M.L.B.*, 117 S. Ct. at 567. *See also* *Ortwein v. Schwab*, 410 U.S. 656 (1973) (stating the general rule of rationality required to assess fee waivers in civil appeals cases; rational justification is ordinarily satisfied by a State's need for revenue to offset court system expenses.). *See, e.g.*, *Harris v. McRae*, 448 U.S. 297 (1980) (holding that a woman's right to an abortion does not extend to a right to a state-funded abortion).

<sup>160</sup> *M.L.B.*, 117 S. Ct. at 566. "In contrast to loss of custody, which does not sever the parent child bond, parental status termination is irretrievabl[y] destructi[ve] of the most fundamental family relationship." *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).



parental termination cases represent a "tightly circumscribed category" of civil cases due to the unique type of deprivation involved.<sup>161</sup>

Justice Thomas dissented, taking issue not only with the result in this case, but with the continued vitality of the *Griffin* line of criminal justice cases.<sup>162</sup> With respect to the due process claim, Justice Thomas concluded that petitioner received all the process she was due because she had a trial, was represented by counsel, and had the right to confront witnesses and cross-examine witnesses.<sup>163</sup> Inasmuch as there is no due process right to an appeal anyway, her due process claim necessarily fails.<sup>164</sup> Judge Thomas spent more time analyzing petitioner's equal protection claim but, there too, concludes that it affords her no relief.<sup>165</sup> The Equal Protection Clause, he asserts, "is not a panacea for perceived social or economic inequity."<sup>166</sup>

The dissent warns that this new found free flowing constitutional right to appellate assistance will not be limited to parental termination cases, but will be invoked in all sorts of civil cases, ranging from paternity suits, to custody cases, to divorce actions, to challenges to zoning ordinances that impact on families, and even to foreclosure actions that result in evicting families from their homes.<sup>167</sup>

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<sup>161</sup> *M.L.B.*, 117 S. Ct. at 566.

<sup>162</sup> *Id.* at 572 (Thomas, J., dissenting). "I do not think that the equal protection theory underlying the *Griffin* line of cases remains viable." *Id.* (Thomas, J., dissenting).

<sup>163</sup> *Id.* (Thomas, J., dissenting)

<sup>164</sup> *Id.* at 571 (Thomas, J., dissenting). "The majority reaffirms that due process does not require an appeal." *Id.* (Thomas, J., dissenting).

<sup>165</sup> *Id.* at 574 (Thomas, J., dissenting). "I see no principled difference between a facially neutral rule that serves in some cases to prevent persons from availing themselves of state employment, or a state-funded education, or a state-funded abortion - each of which the State may, but is not required to, provide . . . ." *Id.* (Thomas, J., dissenting).

<sup>166</sup> *Id.* at 573 (Thomas, J., dissenting). "The Clause . . . seeks to guarante[e] equal laws, not equal results." *Id.* (Thomas, J., dissenting) (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

<sup>167</sup> *Id.* at 576-77 (Thomas, J., dissenting). Responding to the Court's assurances that its holding will not extend beyond parental termination suits,

Justices Scalia and Rehnquist joined his dissent.<sup>168</sup> Notably, however, Chief Justice Rehnquist did not join that part of the opinion that calls for overruling the criminal justice line of cases.<sup>169</sup>

If the dissent is right in predicting that the case will prove to be a launching pad for the discovery of a host of other rights, then it may prove to be the most significant yet unheralded, case of the term. Unfortunately, at least from my point of view, given how carefully Justice Ginsburg crafted her opinion, the dissenter's prediction is not likely to prove accurate. In fact, four weeks after announcing this decision, the Court denied certiorari in a custody case where a mother could not pay the more than five thousand dollars required for the trial transcript to appeal a decision transferring custody of her seven-year-old child to her ex-husband.<sup>170</sup> While it is true that a denial of certiorari in itself does not tell us anything, the likelihood is that the decision in *M. L. B. v. S.L.J.* will not be extended to cases of this type. Thank you very much.

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Justice Thomas stated "I have my doubts that today's opinion will be so confined . . . I fear that the growth of *Griffin* in the criminal area may be mirrored in the civil area." *Id.* at 577 (Thomas, J., dissenting).

<sup>168</sup> *Id.* at 570 (Thomas, J., dissenting).

<sup>169</sup> *Id.*

<sup>170</sup> See *Pope v. Pope*, 667 N.E.2d 1062 (Ill. 1996), *cert denied*, 117 S. Ct. 737 (1997).

